

Curbing Shareholder Voting Groups with a New Philosophy for Washington's Business Corporation Act

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I. INTRODUCTION

The saga of the corporate machine consists of various stages whereby states are attempting to conform their corporate laws with other laws or acts.¹ One recent stage in this saga concerns the corporate scandals of the late-twentieth and early twenty-first centuries² and states' subsequent attempts to conform their corporate laws to the changes of the Sarbanes-Oxley Act. These scandals compelled Congress to reevaluate and to replace the then-existing corporate laws with more restrictive laws.³ These new laws necessitated that corporate attorneys shift their

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1. See Ray Garrett, *Model Business Corporation Act*, 4 BAYLOR L. REV. 412 (1952).

2. A couple of the most notable scandals involved companies such as Enron and WorldCom. See Keith L. Johnson, *Rebuilding Corporate Boards and Refocusing Shareholders for the Post-Enron Era*, 76 ST. JOHN'S L. REV. 788 (2002). The Enron scandal involved Enron's upper management fraudulently reporting the company's financial condition to the SEC on its 10-Q and 10-K forms. See John R. Kroger, *Enron, Fraud, and Securities Reform: An Enron Prosecutor's Perspective*, 76 U. COLO. L. REV. 57, 69–82 (2005). In particular, Enron attempted to hide its true debt condition, to manipulate its market-to-market accounting, and to secretly manipulate its monetization revenues. *Id.* The WorldCom scandal, also involving fraudulent reporting to the SEC, included auditing where operating costs were improperly recorded as capital expenditures to disguise huge losses as even bigger gains. See Kathleen F. Brickey, *From Enron to WorldCom and Beyond: Life and Crime After Sarbanes-Oxley*, 81 WASH. U. L.Q. 357, 369–70 (2003).

3. "In July 2002, the Sarbanes-Oxley Act was signed. The Act was in response to events regarding accounting issues at large public companies and the ensuing calls for action to prevent repetition of these abuses." Edward D. Herlihy, *Contests for Corporate Control 2006 Current Offensive & Defensive Strategies in M&A Transactions*, 1528 PLI/Corp 445 (2006). The Act includes a section that requires attorneys to act as follows:

primary focus from the most basic of issues, shareholder rights, to the seemingly more critical issues relating to financial disclosure by boards of directors.⁴ Although such fundamental changes were essential, corporate attorneys must not forget to give their continued attention to transformations of basic shareholder voting rights.⁵

Originating from a very simple and uncomplicated structure of individual shareholder voting,⁶ shareholder voting in general has evolved and developed into a more detailed system that can involve shareholders voting as a separate "voting group."⁷ Many of the older corporate law cases often dealt only with the procedural issues of individual shareholder voting.⁸ In contrast, modern courts apply a more developed analysis in determining when shareholders of particular classes or series of stock are entitled to vote as voting groups.⁹ Although this Comment will not comprehensively examine how courts and legislatures in all states have transformed their shareholder voting rights, this Comment will focus on the various stages in Washington's transformation to shareholder voting rights. One recent stage in Washington's shareholder voting occurred when the Washington legislature amended the provision in the

[R]eport evidence of a material violation of securities laws or breach of fiduciary duty or similar violation by a company or agent thereof to the company's chief legal counsel or CEO and, if the company executive does not respond appropriately, to the audit committee The rules also provide an alternative reporting system, allowing attorneys instead to report the evidence to the board's qualified legal compliance committee . . . which would have the responsibility of conducting an investigation.

Id. at 468–69. Thus, although the Act may not directly regulate an attorney's direct hands-on involvement as much as an accountant's involvement, the Act nevertheless will indirectly cause attorneys to watch the affairs of their corporate clients more closely and with more frequency.

4. See Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 15 U.S.C.).

5. The importance of shareholder voting lies in the fact that, as an incident of stock ownership, a shareholder's right to vote is "among the most fundamental rights of the ownership of voting shares." 18A AM. JUR. 2D *Corporations* § 850 (2004). Additionally, shareholder voting "has primacy in the system of corporate governance because it is the ideological underpinning upon which the legitimacy of directorial power rests." *Id.* Thus, to overlook the transformations to shareholder voting is to overlook the delicate balance between the shareholder's ownership rights and the subsequently delegated directorial powers.

6. For an example of an uncomplicated structure of individual shareholder voting, see 1866 Wash. Sess. Laws 763.

7. For purposes of this Comment, a voting group is defined as "all shares of one or more classes or series that under the articles of incorporation or [state statute] are entitled to vote and be counted together collectively on a matter at a meeting of shareholders." WASH. REV. CODE ANN. § 23B.01.400(34) (2005). Therefore, "[a]ll shares entitled by the articles of incorporation or [state statute] to vote generally on the matter are for that purpose a single voting group." *Id.*

8. Examples of procedural issues include proper notice of the shareholder meeting or the existence of a quorum.

9. *Williams v. Geier*, 671 A.2d 1368 (Del. 1996), is an example of a more contemporary analytical approach that courts are now incorporating. See discussion *infra* Part IV.A.1.

Washington Business Corporation Act pertaining to classes or series voting as separate voting groups.¹⁰

On July 27, 2003, the Washington legislature unanimously amended Revised Code of Washington (RCW) 23B.10.040 of the Washington Business Corporation Act.¹¹ This amendment to RCW 23B.10.040¹² contained not only technical and clarity changes, but also

10. The importance of class or series voting, now recognized in most jurisdictions as group voting, is found in the fact that group voting "elevates the position of certain classes or series of shareholders by giving a class or series of otherwise non-voting shareholders or shareholders with an aggregate minority voting interest in the corporation a statutorily mandated veto power over a transaction." Philip S. Garon et al., *Challenging Delaware's Desirability as a Haven for Incorporation*, 32 WM. MITCHELL L. REV. 769, 798-99 (2006). Thus, minority shareholders are better able to protect their ownership interest in the corporation. See *infra* note 27.

11. Both chambers unanimously accepted and passed Senate Bill 5123. WA Votes, 2003 Reg. Sess. S.B. 5123. In the Senate, the Bill passed with 46 Yeas, 0 Nays. *Id.* In the House, the Bill passed with 95 Yeas, 0 Nays. *Id.*

12. WASH. REV. CODE § 23B.10.040 (2003). The statute, hereinafter referred to as the Amended Washington Act, reads as follows:

(1) Except as otherwise required by subsection (3) of this section or otherwise permitted by subsection (4) of this section, the holders of the outstanding shares of a class or series are entitled to vote as a separate voting group on a proposed amendment if shareholder voting is otherwise required by this title and if the amendment would:

- (a) Increase the aggregate number of authorized shares of the class or series;
- (b) Effect an exchange or reclassification of all or part of the issued and outstanding shares of the class or series into shares of another class or series, thereby adversely affecting the holders of the shares so exchanged or reclassified;
- (c) Change the rights, preferences, or limitations of all or part of the issued and outstanding shares of the class or series, thereby adversely affecting the holders of shares of the class or series;
- (d) Change all or part of the issued and outstanding shares of the class or series into a different number of shares of the same class or series, thereby adversely affecting the holders of shares of the class or series;
- (e) Create a new class or series of shares having rights or preferences with respect to distributions or to dissolution that are, or upon designation by the board of directors in accordance with RCW 23B.06.020 may be, prior, superior, or substantially equal to the shares of the class or series;
- (f) Increase the rights or preferences with respect to distributions or to dissolution, or the number of authorized shares of any class or series that, after giving effect to the amendment, has rights or preferences with respect to distributions or to dissolution that are, or upon designation by the board of directors in accordance with RCW 23B.06.020 may be, prior, superior, or substantially equal to the shares of the class or series;
- (g) Limit or deny an existing preemptive right of all or part of the shares of the class or series;
- (h) Cancel or otherwise adversely affect rights to distributions or dividends that have accumulated but not yet been declared on all or part of the shares of the class or series; or
- (i) Effect a redemption or cancellation of all or part of the shares of the class or series in exchange for cash or any other form of consideration other than shares of the corporation.

substantive changes carrying important ramifications for the development of Washington's corporate law. Many of these changes have altered Washington's philosophy of minority shareholder voting rights as separate voting groups. As a result, minority shareholder voting groups now are not afforded the same liberal protections that previously existed in Washington's corporate laws and those groups may find it much more problematic in protecting their economic investments in Washington corporations.

This Comment explores Washington's changing philosophy of shareholder voting and how the current developments to Washington's corporate law have impacted shareholder voting group rights. In light of Washington's corporate law history, the underlying reasons for the amendments, and case law, this Comment argues that the recent amendments have altered, rather than preserved, what has been historically the true philosophy underlying Washington corporate law: minority shareholder rights. Part II of this Comment tracks the evolution of voting group rights through past Washington law and until the present Washington Business Corporation Act. Part III discusses the underlying reasons for the amendments, addresses the specific clarity and substantive revisions to the statute, and compares and contrasts the current amendment with the current Delaware General Corporate Law counterpart. Part IV analyzes relevant cases from jurisdictions that have patterned their corporate law after both Delaware's corporate law and the Model Business

(2) If a proposed amendment would affect only a series of a class of shares in one or more of the ways described in subsection (1) of this section, only the shares of that series are entitled to vote as a separate voting group on the proposed amendment. A voting group entitled to vote separately under this section may never comprise a group of holders smaller than the holders of a single class or series authorized and designated as a class or series in the articles of incorporation, unless otherwise provided in the articles of incorporation or unless the board of directors conditions its submission of the proposed amendment on a separate vote by one or more smaller voting groups.

(3) If a proposed amendment, that would otherwise entitle two or more classes or series of shares to vote as separate voting groups under this section, would affect those two or more classes or series in the same or substantially similar way, then instead of voting as separate voting groups the shares of all similarly affected classes or series shall vote together as a single voting group on the proposed amendment, unless otherwise provided in the articles of incorporation or unless the board of directors conditions its submission of the proposed amendment on a separate vote by one or more classes or series.

(4) A class or series of shares is entitled to the voting group rights granted by this section although the articles of incorporation generally describe the shares of the class or series as nonvoting shares. The articles of incorporation may, however, limit or deny the voting group rights granted by subsection (1)(a), (e), or (f) of this section as to any class or series of issued or unissued shares, by means of a provision that makes explicit reference to the limitation or denial of voting group rights that would otherwise apply under subsection (1)(a), (e), or (f) of this section.

Id.

Corporation Act. Part V argues that the recent amendments have consequently altered Washington's original philosophy underlying voting groups. Finally, Part VI proposes that the legislature should amend the provision again to conform to Washington's original philosophy.

II. EVOLUTION OF VOTING GROUP RIGHTS UNDER THE WASHINGTON BUSINESS CORPORATION ACT

To analyze the transformation of voting group rights under RCW 23B.10.040 more effectively, especially in light of the recent amendments, this article looks to the development of Washington's voting group rights during four periods of time in Washington's corporate law: (1) pre-1933 session laws and statutes; (2) 1933 to 1965 amendments and new statutes; (3) 1965 to 1989 amendments; and (4) post-1989 amendments up through the current revisions.¹³ This section looks at the rights voting groups enjoyed, if any, for each respective time period, addresses how these rights changed through subsequent amendments, and notes important insights into the legislative intent underlying voting groups.

A. Washington's Non-Existent Voting Groups—Pre-1933

Washington's first set of statutory corporate laws, enacted on January 27, 1866,¹⁴ reflected more basic and more simplistic mechanics for corporate governance than one finds in today's corporate analog.¹⁵ For example, the original statute neither specifically nor literally mentioned per se "amendments" of the certificates or articles of incorporation.¹⁶ Rather, the language established an uncomplicated procedure by which a corporation could increase or decrease its capital stock.¹⁷ And despite subsequent revisions to other sections of the 1866 statute, the same general statutory language for increasing and decreasing capital stock remained for nearly forty years.¹⁸ As codified, Washington's first corporate law provisions that pertained to "amending" the articles of incorporation

13. As will become clear through the subsequent analysis sections of the article, this breakdown indicates when the more critical or drastic changes and transformations to Washington's corporate law occurred.

14. 1866 Wash. Sess. Laws 763.

15. Compare *supra* note 14 (incorporating simplistic procedures to increase or decrease stock), with *supra* note 12 (incorporating a more delineated structure of situations for voting groups).

16. 1866 Wash. Sess. Laws 768.

17. If a corporation wanted to increase or decrease its capital stock, a stockholder meeting was required to be held by giving notice "signed by at least a majority of trustees, and published at least eight weeks in some newspaper . . . specify[ing] the object of the meeting, the time and place where it [was] to be held, and the amount to which it [was] proposed to [change] the capital, and a vote of two-thirds of all the shares of stock." *Id.*

18. Compare 1879 Wash. Sess. Laws 155 (using the same language as in *supra* note 17), with 1899 Wash. Sess. Laws 174 (maintaining the exact same language as the codified version).

utilized language relating primarily to procedural aspects of corporate governance rather than to substantive shareholder rights.¹⁹ Important to note, however, was the supermajority vote, rather than a mere majority vote, required for increasing or decreasing the corporation's capital.²⁰ Thus, in terms of shareholder voting rights, the legislature was concerned very early that Washington's corporate law needed to provide shareholders with at least some means of protecting their economic interests in the corporation.

Minor technical changes to the statute occurred in 1905 when the legislature revisited its corporate laws and integrated language that resembles more contemporary rhetoric.²¹ This change in statutory language constituted the basis for corporations to "amend"²² their articles of incorporation for over the next twenty-five years.²³ However, despite the relative usefulness and unproblematic nature of these changes,²⁴ the legislature became interested in other significant changes being proposed to

19. The author opines that the statutory requirement of providing notice in the newspaper of the meeting time and place was a procedural technicality rather than an indication of a substantive shareholder right to vote. See 1879 Wash. Sess. Laws 155. But, as stated in the discussion above, the important element to the statute was the required supermajority vote. *Id.* Thus, shareholders, particularly minority shareholders, concerned with increases or decreases to the corporation's capital would likely have found much desired protection in the clause requiring a supermajority vote rather than a mere majority.

20. See 1879 Wash. Sess. Laws 155. Supermajority voting was an important means of protecting minority shareholder interests, and this concept became prevalent during the late 1970s and early 1980s when corporate mergers and acquisitions dominated U.S. equity markets. See Brett W. King, *The Use of Supermajority Voting Rules in Corporate America: Majority Rule, Corporate Legitimacy, and Minority Shareholder Protection*, 21 DEL. J. CORP. L. 895, 918 (1996). For an excellent discussion of the history and evolution of majority voting into supermajority voting, see *id.*

21. The statutory language utilized the literal term "amendments" in describing changes that can be made to the articles of incorporation, provided a similar procedure by which the articles can be amended, and eliminated the requirement of providing notice through a newspaper. See 1905 Wash. Sess. Laws 28.

22. As suggested in the discussion, the integration of the term "amend" was relatively minor. See discussion *supra* Part II.A. The author hypothesizes that the purpose for this technical change was to comport with language becoming more common in other states' corporate laws and being used more often by corporate attorneys and courts. Additionally, with the exception of the deletion of providing notice through the newspaper, no substantive changes were made to the provision. See *supra* note 21.

23. Compare 1905 Wash. Sess. Laws 28 (*supra* note 21), with 1915 Wash. Sess. Laws 273 (making no changes to the relevant amendatory language), and 1923 Wash. Sess. Laws 541 (retaining the exact same amendatory language), and REV. STAT. OF WASH. ANN. § 3805 (1932) (making no changes in the amendatory language).

24. For the time during which this statute was in force, only two cases were ever disputed: first, in *First Nat. Bank of Everett v. Wilcox*, 72 Wash. 473, 131 P. 203 (1913), the Supreme Court ordered a corporation to amend its articles of incorporation to include the change in residence, and then to file the amended articles; and second, in *Tull & Gibbs v. Hinckle*, 130 Wash. 571, 228 P. 599 (1924), the Supreme Court resolved a dispute concerning the filing fee for a corporation that had increased the corporation's capital stock. Thus, neither case involved issues relating to a shareholder's substantive rights, that is, ownership of stock or right to vote.

corporate law on a national level;²⁵ changes that would pave the way for Washington's meaningful introductions to and eventual alterations in voting group laws enacted between 1933 and 1965.

*B. Class Voting: Washington's Initial Transformation
for Voting Group Rights—1933 to 1965*

In 1933, Washington took its first transitioning steps toward recognizing more liberal substantive shareholder voting rights by passing the Washington Uniform Business Corporation Act (Washington Uniform Act).²⁶ The passage of the Washington Uniform Act was not only an effort to follow “the trend toward liberalization and modernization,”²⁷ but also an attempt to promote the concept of a uniform corporate law throughout all states.²⁸ Consistent with the idea of liberalizing and modernizing Washington's corporate law, the Washington Uniform Act recognized situations in which minority shareholders would actually be permitted to vote as a separate voting class,²⁹ even though they were not normally entitled to vote.³⁰ Also, in addition to maintaining the two-thirds supermajority vote for shareholder voting in general, the Washington Uniform Act required that “the holders of *two-thirds of the shares of each class* so affected by the amendment [was necessary]” for the amendment to pass.³¹ Consequently, the combination of “class voting” and a supermajority vote would serve as a basis for protecting minority

25. These changes originated with the Uniform Business Corporation Act (Uniform Act), an act drafted and promulgated in 1928 by the National Conference of Commissioners on Uniform State Laws. However, the Uniform Act was subsequently incorporated by only three other states: Louisiana (1929), Idaho (1929), and Kentucky (1946). See John Richard Steincipher, Comment, *The Model Business Corporation Act—“An Appropriate Starting Place,”* 38 WASH. L. REV. 539 (1963). Any other subsequent changes are addressed in the textual analysis of this Comment below.

26. See 1933 Wash. Sess. Laws 799; REV. WASH. CODE § 23.01 (1933). For an example of the text involved with these changes, see *infra* note 30.

27. Steincipher, *supra* note 25.

28. Washington's assistance came in the form of patterning the Washington Uniform Business Corporation Act (Washington Uniform Act) after the Uniform Act. See Steincipher, *supra* note 25.

29. Class voting allows minority shareholders, usually the holders of preferred stock, to “obtain control over certain decisions of the corporation typically made by the board.” See Kelly Kunsch, *Capitalization and Stock-Voting Rights*, 1B WASH. PRAC. SERIES § 66.29 (2005). Since minority shareholders are thus empowered with a “veto power,” the majority shareholders are usually required to overcome that veto power by an “affirmative vote of a majority of the shares of each class of stock, voting as a class.” See *id.*

30. The Washington Uniform Act recognized two situations where non-voting shareholders were entitled to vote as a separate class: first, when the amendment “would make any change in the rights of the holders of shares of any class”; and second, when the amendment authorized shares “with preferences in any respect superior to those of outstanding shares of any class.” 1933 Wash. Sess. Laws 799.

31. REM. REV. STAT. OF WASH. § 3803-37 (Supp. 1940) (emphasis added) (repealed 1965).

shareholders in Washington for the next thirty plus years.³² Thus, this stage in Washington's changing corporate law became extremely significant because the legislature statutorily recognized that minority shareholders needed not only previously codified procedural protections, but also newly codified substantive protections in the form of class voting.³³

However, the transformation to Washington's corporate law was far from over. Although not a complete failure in terms of modernizing corporate law, the Uniform Act failed to produce the desired uniformity throughout the states.³⁴ Therefore, most states, including Washington, began seeking assistance and direction from other national sources.³⁵ Such assistance became the basis for Washington's changes to the Washington Uniform Act.³⁶ These changes eventually not only led to the more current organization and language of the statute, but also to the subsequent protection for minority shareholder voting rights.³⁷

C. Further Development to Class Voting in Washington—1965 to 1989

In 1965, the legislature once again revisited Washington's corporate law³⁸ and subsequently enacted the Washington Business Corporation Act,³⁹ which began the next stage of Washington's corporate law.

32. Compare 1933 Wash. Sess. Laws 799 (introducing the concept of voting as a class), with 1965 Wash. Sess. Laws 1104 (changing the organization and expanding the situations for when shareholders are entitled to vote as a separate class).

33. This recognition can be plainly observed by noticing the changes from the previous statute to the Washington Uniform Act. For example, whereas the Washington Uniform Act required a two-thirds supermajority vote for amendments other than to change the corporation's name, the previous statute required only a mere majority. See Leslie J. Ayer, *The New Washington Business Corporation Act*, 9 WASH. L. REV. 1, 7 (1934). Accordingly, and as stated in the discussion above, the Washington Uniform Act incorporated the two-thirds supermajority vote into the requirements for an amendment to pass when class voting was involved. See *id.*

34. Because the Uniform Act was not accepted by most states, the Commissioners for the Uniform Act withdrew it as a "uniform act" in 1943 and renamed it the "Model Business Corporation Act." During the development of the Uniform Act, however, the American Bar Association (ABA) was developing its own version of a model business corporation act, which, once released, rapidly gained acceptance by many states. As a result of the widespread acceptance of the ABA's version, the Uniform Act was withdrawn entirely in 1958, and states have since then recognized the ABA's version as the "Model Business Corporation Act" (Model Act). See Robert W. Hamilton, *Reflections of a Reporter*, 63 TEX. L. REV. 1455, 1457 (1985).

35. See *supra* note 34.

36. Two particular changes that were incorporated into the new law included (1) a complete restructuring of the law, and (2) a delineating of the individual situations when shareholders of a particular class can vote as a separate voting class. See 1965 Wash. Sess. Laws 1104.

37. See *infra* note 40.

38. 1965 Wash. Sess. Laws 1053; WASH. REV. CODE § 23A.10.040 (hereinafter referred to as the Washington Act).

39. The Washington Act was passed by a unanimous 89 to 0 vote in the House and with a 45 to 1 vote in the Senate. See Richard O. Kummert, *The Financial Provisions of the New Washington Business Corporation Act*, 41 WASH. L. REV. 207 n.1 (1966).

Incorporating the language, organization, and underlying purposes of the then recently written Model Act (promulgated by the American Bar Association),⁴⁰ the Washington Act not only described instances when a corporation may amend its articles of incorporation,⁴¹ but also enumerated ten specific circumstances when shareholders of a class affected by such an amendment were automatically entitled to vote on the amendment as a separate class.⁴² Thus, in terms of shareholder class voting, these amendments laid the foundation for granting necessary protection to minority shareholders while not interfering with the board's corporate management.⁴³

As a complement to the legislature's improvement of Washington's business corporation laws, the Washington State Bar Association Business Law Section organized the Corporate Act Revision Committee (CARC) in 1975.⁴⁴ CARC assisted with developing Washington's corporate law principally by "recommending appropriate amendments in response to changes in the Model Act and other states' corporate laws."⁴⁵

40. Because the Washington legislature adopted the Model Act nearly verbatim as the governing corporate law for Washington, some historical and explanatory information about the Model Act is necessary. The Model Act was first prepared in 1943 and was later published in 1950 by the Committee on Corporate Law of the Section of Corporation, Banking and Business Law of the American Bar Association (Model Act Committee). See Steincipher, *supra* note 25. It is important to note for this particular time period in Washington's transformation of corporate law that later revisions or addenda to the Model Act came in 1953, 1957, 1959, 1962, and 1964. See Kummert, *supra* note 39, at 208 n.3. Revisions or addendums to the Model Act occurring after 1965 are discussed below. See *infra* note 47.

The Model Act was originally meant to provide a working model for state commissions and bar association committees in order to revise and modernize their corporate laws more easily. The Model Act Committee believed that a carefully planned and moderate pattern would alleviate a large amount of labor and research on the part of local groups everywhere. Thus, the Model Act Committee sought to use "simplicity and clarity of expression, concise and consistent use of terms, standardization of procedure, and plain and precise language." See Ray Garrett, *Preface to the 1950 Revision of MODEL BUS. CORP. ACT (REVISED 1953)*, at iv-v (1953).

Additionally, noting that shareholder rights in some states' corporate laws were treated too loosely or were entirely non-existent, the Model Act Committee devoted a great deal of consideration to strengthen, rather than to weaken, and to more clearly define, shareholder rights. In particular, the Model Act Committee reiterated its position on shareholder voting in the preface to the 1953 revision, that when an amendment to the articles of incorporation alters "the rights, preferences, and the relative status of the shares of any class, the shares of that class are entitled to vote as a class regardless of the articles." See *id.* at vi. Furthermore, the Model Act Committee believed in the preservation of minority representation in all circumstances, not to be left to the decision of promoters who "might destroy it by omission or declaration in the charter." See *id.* at iv-v.

41. See 1965 Wash. Sess. Laws 1101.

42. See *id.* at 1104.

43. This approach was another idea underlying the Model Act. See *supra* note 40.

44. CORPORATE ACT REVISION COMMITTEE, WASHINGTON BUSINESS CORPORATION ACT (RCW 23B) SOURCEBOOK, at v (2005) [hereinafter WASHINGTON SOURCEBOOK].

45. *Id.* When the Corporate Act Revision Committee (CARC) convenes to address Washington's corporate laws, the committee members invite several practicing attorneys who then discuss the prevailing issues in their respective practices and answer questions posed by the CARC commit-

In 1984, CARC became aware of important revisions to the Model Act⁴⁶ and proposed that similar changes be made to Washington's shareholder voting rights provisions.⁴⁷ Interestingly, none of CARC's proposed changes suggested altering the underlying purpose of providing shareholders with protections to their voting group rights.⁴⁸ Thus, shareholders

tee members. Telephone Interview with John Steel, Principal, Gray Cary Ware & Freidenrich, in Seattle, Wa. (Dec. 28, 2005). Thus, by using this approach, CARC can more effectively and efficiently address the most current and problematic issues of Washington's corporate law. *Id.*

46. Returning to the history of the Model Act, one notices that since 1964, revisions to the Model Act have been scarce (with supplements in 1968 and 1977). See REVISED MODEL BUS. CORP. ACT xvii–xviii (1984). However, in 1971 the ABA released a new annotated version of the Model Business Corporation Act that included crucial commentary relating to class voting. See MODEL BUS. CORP. ACT ANN. § 264 (1971). With this release, the ABA adopted the philosophy that a class “should have voting rights on any amendment of the articles that would materially affect that class.” *Id.* Additionally, “[i]t [was] not a prerequisite to such voting rights that the proposed amendment would have an *adverse* affect on the holders of the class, or any of them.” *Id.* (emphasis in original). Furthermore, “[t]he voting rights exist[ed] if the proposed amendment would affect the class in ways specifically enumerated even if the effect is advantageous to the holders of the class.” *Id.*

In 1984, the ABA released a Revised Model Business Corporation Act (Revised Model Act), which replaced the original Model Act. Like the original Model Act, the Revised Model Act acted as a guide for states to revise their own corporate laws. At the time it was released, the Revised Model Act was adopted in substance by about thirty-five states, and other portions have been adopted or followed by other states. See REVISED MODEL BUS. CORP. ACT xvii–xviii (1984).

Important to note with the Revised Model Act in 1984 is the introduction of the concept of “voting groups” rather than the traditional rhetoric of voting as classes. Additionally, the Revised Model Act included three new subsections that began to define more clearly some of the instances in which shareholders would be permitted to vote as separate voting groups, but also clarified that some shareholders are entitled to vote as separate voting groups even if the articles of incorporation describe those shares as nonvoting.

Of particular importance is the ABA's underlying intent in making these revisions. The Revised Model Act recognized that “[t]he right to vote as a separate voting group provides a *major protection* for classes or series of shares with preferential rights or classes or series limited or nonvoting shares against amendments that are especially *burdensome* to that class.” See *id.* at 275 (emphasis added). This philosophy was consistent with the 1971 annotated version that clearly avoided using an *adverse* effect qualification. See MODEL BUS. CORP. ACT ANN. § 264 (1971).

The Revised Model Act was subsequently either revised or supplemented further in 1987 (changes dealing with distributions to shareholders and liability for unlawful distributions), 1988 (changes dealing with directors' conflicting interest transactions), 1990 (changes dealing with limitations of director liability, derivative proceedings, and flexibility and certainty to non-public corporations), 1994 (major changes to the indemnification provisions), 1996 (changes dealing with shareholder meetings and shareholder voting generally), 1997 (changes pertaining to electronic filing), 1998 (changes dealing with standards of conduct for directors and officers, and also with shareholder and director inspection rights and notices), 1999 (changes dealing with appraisal rights, fundamental changes that affect voting powers, and share issuance), 2000 and 2001 (changes to sections dealing with directors and officers, and dissolutions), and 2002 (changes dealing with the use of extrinsic facts for shares and options, and domestication and conversion). See 1 MODEL BUS. CORP. ACT ANN. xxxi–xlili (2005). None of these revisions or supplements altered the underlying intent for the voting group provisions: to serve as a major protection for classes or series of shares with preferential rights or classes or series of limited or nonvoting shares against amendments that are especially burdensome to that class. See REVISED MODEL BUS. CORP. ACT xvii–xviii (1984).

47. *Supra* note 44.

48. See REVISED MODEL BUS. CORP. ACT xvii–xviii (1984). See also *supra* note 44.

continued to enjoy the safeguards that Washington's corporate laws had previously afforded them.

*D. The Most Recent Transformation: From Class
Voting to Voting Groups—1989 to the Present*

Between 1989 and 1990, the legislature again revisited Washington's corporate law⁴⁹ and enacted a new Washington Business Corporation Act,⁵⁰ marking the beginning of Washington's most recent alteration to voting group rights. The New Washington Act acknowledged and adopted what previous legislatures had already perceived:⁵¹ that the "right to vote as a separate voting group provides a *major protection* for classes or series of shares with preferential rights or classes or series of limited or nonvoting shares against amendments that are especially *burdensome*⁵² to that class."⁵³ In clarifying the term burdensome, the legislature stated that "the right to vote by separate voting group[s] is not] dependant on an evaluation of whether the amendment is detrimental to the class or series."⁵⁴ Furthermore, despite the fact that "the question [of] whether an amendment is detrimental is often a question of judgment, [the] approval by the affected class or series is required, irrespective of whether the board or other shareholders believe it is beneficial or detrimental to the affected class or series."⁵⁵ Thus, the inclusion and definition of the word "burdensome"⁵⁶ in the statute suggests that it was initially enacted to provide a more liberal and expansive means for minority

49. REVISED MODEL BUS. CORP. ACT xvii–xviii (1984). See generally Washington State Bar Association Legislative Committee, Minutes of Nov. 11, 2002, <http://www.wsba.org/info/operations/legislative/11802minuteswsbalegislativecommittee.doc>.

50. For an excellent discussion of the specific changes made to the Washington Business Corporation Act at that time (New Washington Act), see John Maurice, *The 1990 Washington Business Corporation Act*, 25 GONZ. L. REV. 373, 423–26 (1990).

51. See WASHINGTON SOURCEBOOK, *supra* note 44, at § 10.040-3 cmt.

52. Although the term "burdensome" is introduced by the Model Act's underlying philosophy for the first time in 1984, see REVISED MODEL BUS. CORP. ACT xvii–xviii (1984), the more liberal nature of the term indicates an intent by the ABA to continue providing a source of "major protection" for minority shareholders. *Id.* Thus, the underlying purpose from the 1971 annotated version of the Model Act was not discounted, and the ABA saw fit to continue providing this protection to shareholder voting rights in the 1984 Revised Model Act. *Id.*

53. WASHINGTON SOURCEBOOK, *supra* note 44, at § 10.040-3 cmt. (emphasis added).

54. *Id.* This language suggests a similar underlying purpose to that incorporated and promulgated by the ABA in the 1971 annotated version of the Model Business Corporation Act. See *supra* note 46.

55. WASHINGTON SOURCEBOOK, *supra* note 44, at § 10.040-3 cmt.

56. Webster's defines the term "burdensome" as "being or imposing a burden." WEBSTER'S II NEW COLLEGE DICTIONARY 147 (3d ed. 1995). The term "burden" is defined as "to weigh down." *Id.* Synonymous with the term "burden" is the term "oppress," meaning "to persecute or subjugate by unjust use of force or authority." *Id.* at 769.

shareholders to protect their economic interests in the corporation rather than to impose restrictions on shareholders.⁵⁷

Although the New Washington Act is aligned with Washington corporate law's historical purpose of protecting minority shareholder interests, the most recent amendments have actually altered Washington's corporate law to the point that shareholders that would historically be entitled to vote as voting groups now have even more restrictions and limitations placed on their voting rights. Consequently, these amendments have placed minority shareholders in a more difficult position to protect their economic interests in the corporation, which is contrary to Washington's historically liberal corporate laws.

III. THE 2003 AMENDMENT

As a result of the specific changes to RCW 23B.10.040, Washington's corporate laws have now conformed more closely to other states' corporate laws but have consequently altered Washington's philosophy regarding voting groups' voting on proposed amendments to the articles of incorporation. An understanding of how these recent amendments have altered Washington's philosophy of shareholder voting group rights requires an appreciation of: (1) the legislature's underlying reasons for the recent changes; (2) the revised subsections in their respective order; and (3) the differences and similarities between Washington's current revisions and the Delaware General Corporate Law counterpart.

A. Underlying Reasons for the Changes

The recent amendments were passed for two primary reasons. First, corporate attorneys wanted more substantive and technical clarification to the ambiguous portions of the provision.⁵⁸ And second, in light of added corporate flexibility in other jurisdictions,⁵⁹ CARC recommended a reevaluation of Washington's lack of a provision⁶⁰ that would allow a corporation to "opt out"⁶¹ of certain voting rights.

57. This inclusion, therefore, also suggests a philosophy that is more consistent with Washington's historical philosophy of providing more liberal protections for shareholder voting rights.

58. Telephone Interview with John Steel, Principal, Gray Cary Ware & Freidenrich LLP, in Seattle, Wa. (Dec. 28, 2005). See also Washington State Bar Association Legislative Committee, Minutes of Nov. 11, 2002, <http://www.wsba.org/info/operations/legislative/11802minuteswsbalegislativecommittee.doc>.

59. In determining these recent changes, CARC looked to several other states' corporate laws, including New York, Illinois, California, and Delaware. Telephone Interview with John Steel, Principal, Gray Cary Ware & Freidenrich LLP, in Seattle, Wa. (Dec. 28, 2005).

60. See Washington State Bar Association Legislative Committee, Minutes of Nov. 11, 2002, <http://www.wsba.org/info/operations/legislative/11802minuteswsbalegislativecommittee.doc>.

61. An "opt out" provision in effect permits a corporation to disregard the statutory default rules for voting group treatment and instead design its own customized requirements for shareholder

1. Substantive and Technical Clarification for Corporate Attorneys

Corporate attorneys looking at the statutory language wanted more clarification for two primary reasons: first, attorneys were confused by the ambiguity of some substantive portions of the statute and would consequently interpret the statute incorrectly.⁶² Second, corporate lawyers noticed internal inconsistencies and overlap among provisions within the statute, particularly the provisions regarding amendments to the articles of incorporation and mergers and acquisitions.⁶³

CARC responded to these concerns by incorporating the phrase “adverse effect” to replace the more liberal phrase “burdensome.”⁶⁴ This change was perhaps the most detrimental to Washington’s underlying philosophy for voting groups because of the very restrictive nature of the term “adverse effect,” which required a showing of hostility toward or injurious effect on the shareholder.⁶⁵ In contrast, the more liberal term “burdensome” required that the shareholder show only that his or her right would be encumbered.⁶⁶ Nevertheless, in clarifying its reasons for

approval. *See id.* None of Washington’s prior Business Corporation Acts had an option for corporations to “opt out” of the statutorily imposed shareholder approval requirements. *See* WASH. REV. CODE § 23B.10.040 (1990), *amended by* 2003 Wash. Sess. Laws 232–34.

62. For example, CARC received six reports of instances where attorneys were interpreting the statute incorrectly in the following situation: if a corporation wanted to amend the terms of a Series A preferred stock, then as long as the Series A stock got those terms the corporation did not need the vote of all the shareholders. Telephone Interview with John Steel, Principal, Gray Cary Ware & Freidenrich LLP, in Seattle, Wa. (Dec. 28, 2005). This interpretation was erroneous. *Id.* But enough attorneys had interpreted the statute in this manner that more clarification was required. *Id.*

Another example of the ambiguity within the statute involved instances where attorneys were concerned that when “only part of a class or series was affected by an amendment, the affected shareholders might be entitled to vote separately on the amendment even though they represented a group that was smaller than the whole class or series . . . [T]his ambiguity was [subsequently] removed [and] amended.” Landefeld et al., WASHINGTON CORPORATE LAW: CORPORATIONS AND LLCs § 9.11 (Supp. 2004).

63. One example involved early stage companies (particularly out-of-state venture capital funds investing in local companies). Telephone Interview with John Steel, Principal, Gray Cary Ware & Freidenrich LLP, in Seattle, Wa. (Dec. 28, 2005). Money from these investors would come in and lawyers would negotiate investment terms. *Id.* Included in these terms were provisions involving circumstances where investors, as holders of stock, were entitled to a veto. *Id.* The question then arose as to who had the veto power over a merger. *Id.* The advice given by Washington attorneys was that, in addition to a general veto power, common stockholders also had a specific veto power for a variety of other reasons (relying on the amendments to articles of incorporation provision). *Id.* Consequently, the out-of-state investors expressed shock over the common stockholders having a veto power that could essentially block a merger. *Id.*

64. *See supra* note 12; *see also* discussion *infra* Part III.B.1.

65. Adverse is defined as hostile or injurious, or contrary or in opposition (to). *See* THE OXFORD AMERICAN DICTIONARY AND LANGUAGE GUIDE 15 (1999); BLACK’S LAW DICTIONARY 58 (8th ed. 2004).

66. The verb form of “burden” is also defined as encumbering. *See* THE OXFORD AMERICAN DICTIONARY AND LANGUAGE GUIDE 123 (1999); BLACK’S LAW DICTIONARY 208 (8th ed. 2004).

this particular substantive change, CARC commented that this “adverse effect” qualification is “utilized to varying degrees by several other states[.]”⁶⁷ and “despite the apparent subjectivity of the concept, it is no more subjective than many statutory phrases found elsewhere in RCW Ch. 23B, including the references to ‘substantially similar’ effects in the existing voting group provisions.”⁶⁸ Thus, in “keeping up” with other jurisdictions, Washington’s new corporate law not only disregards Washington’s historical philosophy of more liberal protections, but it also introduces a new shareholder voting philosophy that more severely restricts voting group rights, despite the apparent ambiguity of the phrase “adverse effect.”

Unlike CARC’s reasons for the substantive changes, CARC’s reasons for the technical modifications actually suggest that they were trying to include even more liberal protections for shareholder voting groups. In addition to explaining that these technical changes provided much needed clarity to the general statutory framework,⁶⁹ CARC emphasized that the changes provide further clarity for previously confusing situations involving a part of a series or class that is affected by the proposed amendments.⁷⁰ Ironically, these technical changes actually provide for more liberal protections and are more akin to the protections that Washington’s previous corporate law once afforded its shareholders.

2. More Corporate Flexibility

On its own initiative, CARC proposed changes that now give corporations added flexibility and control over voting group rights, resulting in a drastic change to Washington’s traditional philosophy of voting group rights. To further clarify its reasons, CARC commented that “the . . . changes recognize[d] that, consistent with the broadly permissive philosophy of [the Revised Code of Washington] Ch[apter] 23B, corporations should be given flexibility in appropriate circumstances to limit

Thus, the adjective form “burdensome” necessarily means that someone or something is encumbered.

67. WASHINGTON SOURCEBOOK, *supra* note 44, at § 10.040-5 history and committee cmt.

68. *Id.*

69. *Id.* This clarity has also been recognized by practitioners. See Stephan H. Coonrod, *Washington Business Corporation Act Amendments: Shareholder Voting Group Rights, Shareholder Notice Requirements and Stock Splits* (April 18, 2003), <http://www.klgates.com/newsstand/Detail.aspx?publication=3460>.

70. See WASHINGTON SOURCEBOOK, *supra* note 44, at § 10.040-5 history and committee cmt. The changes are more liberal. When even a part of a series or class is affected by the proposed amendment, the entire series or class is entitled to vote. See discussion *infra* Part III.B.2.

or even deny group voting rights relative to certain amendments.”⁷¹ CARC also noted:

[b]y permitting such rights to be limited or denied in the articles of incorporation, the . . . changes treat group voting similarly to preemptive rights, cumulative voting, the right to vote on future preferred stock preferences, and a variety of other shareholder rights that may be denied or limited in the articles by the incorporators, or subsequently by shareholders’ approval of an amendment to the articles.⁷²

With an understanding of the underlying purposes for the changes, we can now look to the specific modifications and the ways they changed Washington’s philosophy regarding shareholder voting group rights.

B. Changes to the Statute

1. Section One

In addition to a technical change, section one also contains important substantive changes that have altered previous protections to shareholder voting group rights.⁷³ Seven distinct changes are found in section one. To begin, the technical change consisted of the addition of the words “or series”⁷⁴ interspersed throughout the section and in conjunction with the term “class.”⁷⁵ This change conformed this section with other sections of the New Washington Act and with similar changes to other sections of this particular provision.

The substantive changes, however, created more drastic changes to Washington’s underlying voting group philosophy. First, the addition of

71. WASHINGTON SOURCEBOOK, *supra* note 44, at § 10.040-5 history & committee cmt. Although the Model Act and Revised Model Act have been somewhat permissive in allowing corporations flexibility in running the affairs of the corporation, they nevertheless have required and afforded major protections to shareholder voting rights that are less restrictive than the Amended Washington Corporation Act, as indicated in their underlying purposes. See *supra* note 40; *supra* note 46.

72. *Id.* CARC has justified these changes on the grounds that “shareholders will either become aware of such a limitation or denial in the articles before they acquire their shares, or will be given the opportunity to vote on any amendment that withdraws or limits their group voting rights after their shares have been issued.” *Id.* However, CARC has assumed that “[a]s with other statutory language, legal counsel will presumably advise corporate clients to withhold voting group rights only in cases where it is clear that there is no potential for harm to existing holders.” *Id.*

73. See *supra* note 12.

74. WASH. REV. CODE § 23B.10.040(1)(a)–(1)(h) (2003).

75. Prior to the change, the statute employed only the term “class” when discussing the authorized shares that would be allowed to vote as separate voting groups upon proposed amendments to the articles of incorporation. *Id.*

the “adversely affected” clause⁷⁶ throughout the provision now requires that shares of classes or series only “adversely affected” by the proposed amendment may vote as a separate voting group.⁷⁷ Next, the legislature deleted one entire circumstance when shareholders were previously allowed to vote as separate voting groups.⁷⁸ In addition, the legislature inserted an entirely new subsection that appears to provide for more shareholder protections.⁷⁹ Also, the legislature added language that recognized voting rights for voting groups when the amendment creates new shares or increases the rights of certain shares when directors could, in accordance with RCW section 23B.06.020, create or designate such shares as preferential or superior.⁸⁰ Further, the legislature placed some potential exceptions at the beginning of section one, whereby shareholders would be required or permitted to vote as separate voting groups (this added exception will be addressed in more detail below when discussing the changes to sections three and four).⁸¹ And finally, the deletion of the word “decrease”⁸² from subsection (a) now limits shareholders to vote as voting groups in this particular circumstance when the aggregate number of shares of the class or series is increased, rather than either increased *or decreased*.⁸³

76. This change to section one is perhaps a more notably important change because of its insight into the amendment’s underlying purpose.

77. WASH. REV. CODE § 23B.10.040(1)(a)–(1)(h) (2003).

78. Previously, shareholders were allowed to vote as separate voting groups when the amendment would “effect an exchange or reclassification, or create the right of exchange, of all or part of the shares of another class into shares of the class.” See WASH. REV. CODE § 23B.10.040(1)(a)–(1)(h), (c) (1990), *amended by* Wash. Sess. Laws 232–34.

79. WASH. REV. CODE § 23B.10.040(1)(i) (2003). This subsection was to account for and to recognize voting group rights for cash outs of all or part of the shares of a class or series. See WASHINGTON SOURCEBOOK, *supra* note 44, at § 10.040-4 history & committee cmt. Thus, this new subsection actually expands voting group rights by clarifying that when any part of a series or class is going to be cashed out, then the entire series or class is entitled to vote as a voting group. See *id.* at 10.040-5. This new addition suggests, therefore, more protection for voting groups.

80. WASH. REV. CODE § 23B.10.040(1)(e) (2003). This change was made to recognize that the creation of a “new class of ‘blank check’ preferred stock, that may have prior, superior or substantially equal dividend, redemption or liquidation preferences to those of existing holders, has a clear potential for adverse affects and therefore gives rise to group voting at the time the ‘blank-check’ stock is authorized.” See WASHINGTON SOURCEBOOK, *supra* note 44, at § 10.040-4 history & committee cmt. Thus, this change is “especially important since the eventual designation of new preferred series will be accomplished by Board action alone, and will not give rise to any shareholder voting, let alone any voting by groups of shareholders.” *Id.*

81. WASH. REV. CODE § 23B.10.040(1) (2003).

82. *Id.* § 23B.10.040(1)(a).

83. This deletion is in direct contradiction to Washington’s historical philosophy because prior to this change “the voting rights exist[ed] if the proposed amendment would affect the class in any of the ways specifically enumerated[,] even if the effect is advantageous to the holders of the class.” MODEL BUS. CORP. ACT ANN. § 264 (1971). With the addition of the “adversely affect” clause, the deletion of the term “decrease” is logical because “decreases in the size of a class or series hold little

2. Section Two

Section two includes both substantive and technical changes relating to a situation where parts of a series are affected by proposed amendments. Section two now clarifies that the “holders that may be entitled to vote separately are those that are formally authorized as classes or designated as series in the articles of incorporation.”⁸⁴ This change helps to “eliminat[e] any ambiguity arising from the fact that specific effects on ‘part’ of a class or series give rise to voting group treatment.”⁸⁵ However, the section also now provides that corporations may opt out of the statutorily imposed voting rights contained in this section.⁸⁶ Thus, although the new opt out provision gives corporations more flexibility, these changes also provide minority shareholders with an added mechanism with which to protect their ownership interests, and thereby add to the liberal protections previously afforded shareholders.

3. Section Three

Four particular changes to section three signify a shift from Washington’s previously liberal philosophy to the new restrictive philosophy. First, the phrase “class or series” was added throughout this section in order to align it more succinctly with the technical additions made to the other sections.⁸⁷ Second, the legislature added a small clause to clarify when classes or series will vote separately, or when they will be combined into one voting group.⁸⁸ Third, a change in the term “must” to “shall” now makes this provision more consistent with other provisions throughout the New Washington Act.⁸⁹ And finally, an “exception” clause was tacked on at the end of the section disallowing similarly affected classes or series to vote as separate voting groups “unless otherwise provided in the articles of incorporation or unless the board of directors conditions its submission of the proposed amendment on a separate vote by one or more classes or series.”⁹⁰ Thus, although the changes

potential for harm to existing holders, and would not give rise to voting group rights.” WASHINGTON SOURCEBOOK, *supra* note 44, at § 10.040-5 history & committee cmt.

84. WASHINGTON SOURCEBOOK, *supra* note 44, at § 10.040-5 history & committee cmt. See also *supra* note 12.

85. WASHINGTON SOURCEBOOK, *supra* note 44, at § 10.040-5 history & committee cmt. This ambiguity was removed and the statute was amended “to make clear that even when only a part of a class or series is affected by an amendment, that part has no separate group voting right; rather, the group that is entitled to vote separately on the amendment is comprised of holders of the entire class or series.” Landefeld et al., *supra* note 62, at § 9.11.

86. See *supra* note 12.

87. 2003 Wash. Sess. Laws 234.

88. The exact clause states: “then instead of voting as separate voting groups.” *Id.*

89. *Id.* at 233–34.

90. *Id.* at 234.

specifically suggest that “similarly affected classes [and] series should normally be combined together into a single voting group,”⁹¹ these changes have ultimately limited the shareholder voting group rights, have expanded corporate flexibility, and have consequently resulted in a contradiction to Washington’s original philosophy of voting group rights.

4. Section Four

The technical changes to this section substantiate the legislature’s underlying purpose of providing more clarity, but the substantive changes therein further alter Washington’s shareholder voting philosophy. As in most other sections, the addition of the clause “or series” created more consistency and clarity throughout this provision when speaking in terms of “classes or series.”⁹² However, a significant substantive change to this section now affords corporations an option to opt out of the statutorily imposed voting group rights, thereby providing corporations with more flexibility.⁹³ This change consequently permits corporations to limit or deny in the articles of incorporation the voting group rights that are in fact already granted by certain subsections in the provision.⁹⁴ Thus, although the technical change aligns the language of this section with the other sections in the provision, the substantive change transforms Washington’s historically liberal voting group philosophy into a much more restrictive philosophy.

C. Differences and Similarities Between RCW 23B.10.040 and Delaware’s General Corporate Law Counterpart

States develop their corporate laws from two general bases⁹⁵—either states adopt the Model Act provisions, or a derivation thereof,⁹⁶ or they adopt provisions similar to Delaware’s corporate law.⁹⁷

91. WASHINGTON SOURCEBOOK, *supra* note 44, at § 10.040-5 history & committee cmt.

92. 2003 Wash. Sess. Laws 234.

93. This Comment will not focus on addressing or arguing this particular aspect of the substantive changes. However, for a general discussion about default rules and opt-out options, see Symposium, *Van Gorkom and the Corporate Board: Problem, Solution, or Placebo?*, 96 NW. U. L. REV. 489 (2002).

94. These sections pertain to circumstances when the amendment increases the aggregate number of shares, creates a new class or series with preferential rights, and increases the preferential rights of classes or series of those shares. *See supra* note 12.

95. *See generally* JONATHAN R. MACEY, MACEY ON CORPORATION LAWS § 7.04[B] (Supp. 2003).

96. Thirty-six jurisdictions have currently adopted and now follow the Revised Model Act, either procedurally or substantively or both; only twelve states have opted to draft their own corporate laws. *See id.*

97. Only Kansas and Oklahoma have adopted Delaware’s provision. *See id.* The relevant provision in Delaware’s General Corporate Law states:

A brief comparison between the substantive aspects⁹⁸ of Delaware's and Washington's voting group rights⁹⁹ emphasizes the fundamental change in philosophy to Washington's voting group rights.

The statutory language of Delaware's and Washington's provisions has traditionally suggested contrary philosophies underlying shareholder voting group rights.¹⁰⁰ However, both statutes now contain more

The holders of the outstanding shares of a class shall be entitled to vote as a class upon a proposed amendment, whether or not entitled to vote thereon by the provisions of the certificate of incorporation, if the amendment would increase or decrease the aggregate number of authorized shares of such class, increase or decrease the par value of the shares of such class, or alter or change the powers, preferences, or special rights of the shares of such class so as to affect them adversely. If any proposed amendment would alter or change the powers, preferences, or special rights of 1 or more series of any class so as to affect them adversely, but shall not so affect the entire class, then only the shares of the series so affected by the amendment shall be considered a separate class for the purposes of this paragraph. The number of authorized shares of any such class or classes of stock may be increased or decreased (but not below the number of shares thereof then outstanding) by the affirmative vote of the holders of a majority of the stock of the corporation entitled to vote irrespective of the provisions of this subsection, if so provided in the original certificate of incorporation, in any amendment thereto which created such class or classes of stock or which was adopted prior to the issuance of any shares of such class or classes of stock, or in any amendment thereto which was authorized by a resolution or resolutions adopted by the affirmative vote of the holders of a majority of such class or classes of stock.

DEL. CODE ANN. tit. 8, § 242(b)(2) (2005).

98. Although the structural and organizational differences are apparent, and may not typically indicate a difference in underlying philosophy, the author opines that the structural difference between these statutes is quite important in terms of Washington's underlying philosophy.

99. Although a complete historical account of Delaware's corporate law is outside the scope of this Comment, a couple crucial changes to Delaware's corporate law are worth noting at this point. The first involves the monumental decision of *Hartford Accident & Indemnity Co. v. W.S. Dickey Clay Manufacturing Co.*, 24 A.2d 315 (Del. 1942), because this holding was later codified to require that the minority shareholders had to be adversely affected by the proposed amendment. See discussion *infra* Part IV.A.1.

Another important change occurred in 1999 after the Delaware legislature amended the statute. For the purposes of this Comment, it is very important to note the Delaware legislative intent in making the change:

[T]o provide fewer voting rights, of pure statutory origin, to members of nonstock corporations in the adoption of amendments to the certificate of incorporation; in sum, such members have neither the rights to vote on an amendment generally nor a right to vote on an amendment as a class member unless the certificate of incorporation provides otherwise.

DEL. CODE ANN. Tit. 8, § 242(b)(2) (2005) (emphasis added). This change was apparently a direct response to *Farahpour v. DCX, Inc.*, 635 A.2d 894 (Del. 1994). See DEL. CODE ANN. tit. 8, § 242(b)(2) (2005). However, the important difference for purposes of this Comment is that the Amended Washington Act does not involve instances for nonstock corporations, but rather for corporations that issue stock as evidence of ownership rights and subsequent economic benefits.

100. Various opinions suggest that jurisdictions patterning their corporate law after the Model Act are not substantially broader than Delaware's counterpart. See Philip S. Garon et al., *Challenging Delaware's Desirability as a Haven for Incorporation*, 32 WM. MITCHELL L. REV. 769, 799 (2006). However, the author is of the opinion that the enumeration of specific instances in which shareholders automatically have a right to vote as a separate voting group implies a much broader

substantively similar language¹⁰¹ that implicates a fundamental change to Washington's voting group philosophy. Both statutes now require that proposed amendments "adversely affect"¹⁰² a class or series before any voting group rights are recognized.¹⁰³ Such a qualification, however, infers a direct contradiction to Washington's historical approach of providing more liberal shareholder voting rights.¹⁰⁴ Thus, both statutes advance a restrictive philosophy with respect to permitting voting groups a right to vote on proposed amendments.

However, two principal differences between the statutes suggest that Washington's efforts to provide for more restrictive voting rights were incomplete and have created an undesirable tension in the language. First, unlike the nine specifically enumerated instances found in Washington's statute,¹⁰⁵ Delaware's statute permits shareholders to vote as separate voting groups on a proposed amendment in only three specific instances.¹⁰⁶ And second, Washington's provision requires a two-thirds supermajority vote,¹⁰⁷ as opposed to Delaware's simple majority vote,¹⁰⁸ in order for the proposed amendment to pass. Thus, when viewed together, these similarities and differences between statutes actually create

philosophy of voting group rights than an arguable "catch-all" clause in Delaware's provision. *See id.*; DEL. CODE ANN. tit. 8, § 242(b)(2) (2005).

101. *Compare* DEL. CODE ANN. tit. 8, § 242(b)(2) (2005), *with* WASH. REV. CODE § 23B.10.040 (2003).

102. The author is of the opinion that the phrase "adversely affect" connotes a higher standard than the "burdensome" standard previously relied upon in Washington. Thus, this higher standard necessarily imposes a more restrictive approach to when shareholders are entitled to vote as a separate voting group.

103. *Compare* DEL. CODE ANN. tit. 8, § 242(b)(2) (2005), *with* WASH. REV. CODE § 23B.10.040 (2003). This similarity gives Washington courts an indication of the direction in which they will be heading in terms of restricting voting group rights when interpreting the Amended Washington Act provision. *See* discussion *infra* Part IV.

104. *See supra* note 101.

105. *See supra* note 12. Although a statute can grant broad corporate powers while delineating exceptions, the author opines that the delineations suggest a desire to be more liberal in granting shareholders protections to their ownership interests. Thus, Washington's historically liberal philosophy is actually supported more by the fact that, despite the somewhat permissive nature of the Model Act, the voting rights are somewhat more protected because the voting right automatically exists with shareholder voting groups "if the proposed amendment would affect the class [or series] in any of the ways specifically enumerated." *See* MODEL BUS. CORP. ACT ANN. § 264 (1971).

106. These instances include when the amendment would "increase or decrease the aggregate number of authorized shares of such class, increase or decrease the par value of the shares of such class, or alter or change the powers, preferences, or special rights of the shares of such class so as to affect them adversely." DEL. CODE ANN. tit. 8, § 242(b)(2) (2005). Such language suggests a more permissive approach to corporate governance than what Washington has traditionally permitted. Additionally, because Washington eliminated the financial aspect of par value in 1980, these instances equate to only two of the nine enumerated situations found in Washington's statute. *Compare* DEL. CODE ANN. tit. 8, § 242(b)(2) (2005), *with* WASH. REV. CODE § 23B.10.040 (2003).

107. WASH. REV. CODE § 23B.10.030 (2003).

108. DEL. CODE ANN. tit. 8, § 242(b)(2) (2005).

an undesirable tension between Washington's attempt to incorporate a new and more restrictive philosophy while simultaneously trying to maintain substantive aspects that reflect Washington's historically liberal underlying voting group rights philosophy.

IV. CASE STUDIES OF THE RESTRICTIONS TO VOTING GROUPS

Although Washington's corporate law is patterned after the Model Act, both Delaware's statute and the Amended Washington Act now contain analogous provisions. Because of these similarities, a closer look into the judicial interpretations of Delaware's provision and the courts' interpretations of statutes patterned after the Model Act illuminates Washington's recent transition to a more restrictive voting group philosophy.

A. Cases from Delaware and Other Jurisdictions Following Delaware's Corporate Law

1. Delaware Cases

The Delaware Supreme Court has recognized that "the jurisprudence of class vot[ing] in Delaware is not highly developed."¹⁰⁹ Thus, only a few Delaware cases actually involve situations in which the court was required to decide if shareholders were entitled to vote as a separate voting group because the proposed amendment adversely affected those shareholders.¹¹⁰ One case in particular that set the stage for Delaware, and that later became Delaware's codified standard for proposed amendments that "adversely affected" shareholders, is *Hartford Accident & Indemnity Co. v. W.S. Dickey Clay Manufacturing Co.*¹¹¹ In *Hartford*, the court was asked to determine whether a proposed amendment to a corporate charter that would double the company's amount of Class A common stock was valid and could thus be submitted to the Secretary of State for filing.¹¹² The plaintiffs asserted that the proposed amendment could not be submitted because it did not receive the required majority

109. *Orban v. Field*, No. 12820, 1993 WL 547187, at *8 (Del. Ch. Dec. 30, 1993) (citing Drexler, Black & Sparks, DEL. CORP. LAW AND PRACTICE § 32.04 (1993)).

110. Cases where the courts interpreted only the provision relating to amendments to the articles of incorporation include the following: *Williams v. Geier*, 671 A.2d 1368 (Del. 1996); *Hartford Accident & Indem. Co. v. W.S. Dickey Clay Mfg. Co.*, 24 A.2d 315 (Del. 1942); *Dalton v. Am. Inv. Co.*, 490 A.2d 574 (Del. Ch. 1985); *Orban*, 1993 WL 547187. The author has been unable to find any other Delaware cases where the court interprets Delaware's provision pertaining only to voting group rights on amendments to the articles of incorporation; most cases involved corporate mergers, thereby invoking an entirely different provision.

111. 24 A.2d at 315.

112. *Id.* at 318.

vote by the non-consenting common stockholders, who plaintiffs also asserted should have been permitted to vote as a separate class.¹¹³ The Delaware Supreme Court found that the defendant company's Class A stock holders voted separately from the preferred and remaining common stock holders at the shareholder meeting and subsequently affirmed and passed the proposed amendment by more than the required majority vote.¹¹⁴ Further, the court held that although the remaining preferred and common stock holders voted together as a separate group, a majority of votes of this group had affirmed the proposed amendment even though the vote did not consist of a majority vote of the common stock then outstanding.¹¹⁵ Subsequently, the court sustained the lower courts' decisions and permitted the amended articles of incorporation to be submitted to the Secretary of State for filing.¹¹⁶

In its analysis, the court looked first to the type of proposed amendments that would permit a shareholder group to vote as a separate voting class.¹¹⁷ In particular, the court focused on the statutory language of the "relative, participating, optional, or other special rights" that would be adversely affected by a proposed amendment and determined that "it [was] clear enough [from the construction of the statute] that the word ['special'] was used in the sense of shares having some unusual or superior quality not possessed by another class of shares."¹¹⁸ However, the court warned against confusing the relative position of one class of shares in the scheme of capitalization with the rights incident to that class as compared with other classes of shares.¹¹⁹ Therefore, the court concluded that

[although a] corporate amendment does no more than to increase the number of shares of a preferred or superior class, the relative position of subordinated shares is changed in the sense that they are subjected to a greater burden. The peculiar, or special, quality with which [these shares] are endowed, and which serves to distinguish them from shares of another class, remains the same.¹²⁰

In finding the language of the statute to be plain and to convey a clear and definite meaning, the court refused to reconstruct the statute to find a different meaning.¹²¹ Finally, although there was a plausible argument

113. *Id.*

114. *Id.* at 317.

115. *Id.* at 322.

116. *Id.* at 327.

117. *See id.* at 318.

118. *Id.* at 318 (internal quotations removed).

119. *Id.*

120. *Id.* at 318-19.

121. *Id.* at 320.

for protecting those shareholders that would have been burdened by the proposed amendment by allowing them to vote as a separate class, the court refused to trespass onto the grounds of "public policy and economy . . . under the appearance of construction."¹²² Thus, the court completely rejected the more liberal philosophy that would have included an underlying purpose of the amendment being "burdensome" to the shareholders and instead incorporated a more restrictive philosophy requiring amendments to adversely affect shareholders.

Next, in looking at the contractual rights of the shareholders as found in the corporate charter,¹²³ the court found that although the corporate charter granted exclusive voting rights to the preferred and common stockholders, except in the case of specified defaults,¹²⁴ the charter did not give the common shares the right to veto by class vote.¹²⁵ The court refused to "reconstruct the contract by giving to the common shares a right never intended to be given."¹²⁶ Because neither the articles of incorporation nor the statutory provision provided a means for the minority shareholders to vote as a separate voting class, the court held that the non-consenting common stock shareholders were not entitled to vote as a separate voting class.¹²⁷ Thus, with this decision, Delaware's Supreme Court introduced a very restrictive philosophy for minority shareholders and a very broadly permissive philosophy for a corporation to govern its affairs with very limited intervention by voting groups.

After *Hartford*, the Delaware courts have very narrowly and restrictively interpreted the phrase "adversely affected" so that shareholders are hard-pressed to find situations in which they are entitled to vote as a separate voting class.¹²⁸ For example, in *Williams v. Geier*,¹²⁹ the Delaware Supreme Court was asked to determine whether an amendment that would recapitalize the corporation's financial structure was valid where the recapitalization would substantially benefit the majority shareholders and where a majority of all outstanding shares had voted in the affirmative.¹³⁰ The court held that Delaware General Corporation Law did not require a majority of the outstanding minority shares to vote in favor of a transaction which necessarily benefits the majority shareholders.¹³¹ The

122. *Id.*

123. *Id.* at 322.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. See discussion *supra* Part IV.A.1.

129. 671 A.2d 1368 (Del. 1996).

130. See *id.*

131. *Id.* at 1382.

court clarified the role of a "majority of the minority vote" by explaining that "[w]here . . . there is a controlling stockholder or controlling bloc, there is no requirement under the Delaware General Corporation Law that the transaction be structured or conditioned so as to require an affirmative vote of a majority of the minority group of outstanding shares."¹³² Thus, Delaware's courts began reinforcing its more restrictive philosophy by finding very few situations, if any, in which amendments to the articles of incorporation adversely affect shareholders to the extent that entitles them to vote as a separate voting group.

A final example of Delaware's courts narrowly interpreting Delaware's voting group rights provision and consequently expanding its restrictive philosophy over voting group rights involved the Delaware Chancery Court holding that a plan of recapitalization in anticipation of a corporate merger did not give rise to voting group rights.¹³³ In *Orban*, the recapitalization plan would have increased the total number of common stock shares, thereby decreasing the plaintiff's percentage ownership of the common shares to under a majority ownership of the common stock.¹³⁴ The plaintiffs asserted that the recapitalization plan "required approval by the common stock voting as a separate class, which was not obtained."¹³⁵ In dismissing this assertion, Chancellor Allen looked first to the certificate of incorporation and found no creation of a right to vote as a separate class.¹³⁶ Additionally, in determining that § 242(b) of Delaware's statute also did not create a right for the minority shareholders to vote as a class, Chancellor Allen reasoned along the same lines as in *Hartford*: the right to vote in this particular instance was "not a peculiar or special characteristic of common stock in the capital structure" and that "all classes of stock share that characteristic; the voting power of each class of stock would be pro-rata diluted by the issuance of [a new series of preferred stock] and thus all were entitled to vote equally (in one general class) on the amendment."¹³⁷ In perpetuating its underlying restrictive approach to voting group rights, Delaware's courts have seldom found situations in which any shareholders have been adversely affected by the proposed amendments.¹³⁸

132. *Id.*

133. *Orban v. Field*, No. 12820, 1993 WL 547187 (Del. Ch. Dec. 30, 1993).

134. *Id.* at *3.

135. *Id.* at *5.

136. *Id.* at *7-8.

137. *Id.* at *8.

138. In fact, the author has been unable to locate any Delaware cases in which a court found a situation that adversely affected the shareholders and thereby granted them the right to vote as a voting group.

2. Other Jurisdictions Following Delaware's Corporate Law

As in Delaware, other jurisdictions closely following Delaware's corporate law have similarly determined that there are few, if any, instances in which a shareholder's interest is adversely affected by a proposed amendment, thereby entitling the shareholders to vote as a separate voting group.¹³⁹ One example is *Achey v. Linn County Bank, DSP*, in which the U.S. District Court for the District of Kansas was asked to interpret a Kansas statute virtually identical to Delaware's corporate law statute.¹⁴⁰ In *Achey*, the corporation presented an amendment that proposed a reverse stock split,¹⁴¹ decreasing the aggregate number of shares and eliminating the minority shareholders.¹⁴² In determining that the relevant statutory provisions did not "prohibit a corporation with a single class of stock from amending its articles of incorporation so as to effect a reverse stock split,"¹⁴³ the court held that "the minority shareholders . . . [did] not have the power to veto a reverse stock split that would eliminate minority shareholders."¹⁴⁴ The court reasoned that the statutory language in dispute "applie[d] in the context of several classes of stock and prevent[ed] the vote of the members of one class from affecting the rights of members of a different class"¹⁴⁵ and that the relevant statutory provision was "a procedural provision, not one of limitation."¹⁴⁶ Consequently, this decision suggests that courts in jurisdictions following Delaware's corporate law and that incorporate the phrase "adversely affected" will be less likely to find situations where minority shareholders are entitled to vote as a separate voting group.¹⁴⁷

139. Other than the cited case, examples from other jurisdictions that closely follow Delaware's corporate law include: *TLX Acquisition Corp. v. Telex Corp.*, 679 F. Supp. 1022, 1024 (W.D. Okla. 1987) (mentioning the relevant statute's requirements in an acquisition and merger setting, but not addressing any substantive issues pertaining to that statute); and *Health Midwest v. Kline*, No. 02-cv-08043, 2003 WL 328845, at *27 (Kan. Dist. Ct. Feb. 6, 2003) (citing the relevant statute only and not reaching any substantive aspects of the statute).

140. 966 F. Supp. 1026 (D. Kan. 1997).

141. A reverse stock split is defined as a "reduction in the number of a corporation's shares by calling in all outstanding shares and reissuing fewer shares having greater value." BLACK'S LAW DICTIONARY 1459 (8th ed. 2005).

142. *Achey*, 966 F. Supp. at 1028–29.

143. *Id.* at 1029.

144. *Id.*

145. *Id.* (internal quotations removed).

146. *Id.* (internal quotations removed).

147. There are no other cases directly on point that relate to voting groups from jurisdictions that follow Delaware's General Corporation Law. See *supra* note 138.

B. Cases from Other Model Business Corporation Act Jurisdictions

Like the courts in Delaware and the courts in jurisdictions adopting Delaware's voting group rights provision, courts in jurisdictions that have adopted the Model Act with provisions similar to the Amended Washington Act have not found instances where shareholders are adversely affected to the point of warranting voting group rights. For example, in *Shanken v. Lee Wolfman, Inc.*, a corporation attempted to increase the aggregate number of shares of its Class A and Class B stock, but not the Class C stock.¹⁴⁸ The plaintiff contended that under both the certificate of incorporation and the Texas Business Corporation Act, the Class C stock should have been permitted to vote as a separate voting class. The plaintiff further argued that because the Class C stock did not pass the amendment by a required two-thirds majority vote, the amendment was null and void, even though it passed by over a two-thirds majority vote by both the Class A and the Class B stockholders.¹⁴⁹ In looking to both the charter and the Texas Business Corporation Act, the Court of Civil Appeals held that the Class C shareholders were not entitled to vote as a separate voting group.¹⁵⁰ The court reasoned that "the charter amendment in question did not change the shares of Class A and Class B stock into a different number of shares of the same class but merely increased the aggregate number of authorized shares of such classes as provided in [the Texas Business Corporation Act]."¹⁵¹ The court indicated that both the certificate of incorporation and the Texas Business Corporation Act utilized language that specifically narrowed the privilege to vote as a separate class to instances where the amendment "increase[d] or decrease[d] . . . the aggregate number of authorized shares of such class."¹⁵²

The court also held, in the alternative, that the effect of the amendment did not change the "designations, preferences, limitations, or relative rights of the shares of '*such*' class."¹⁵³ The court relied on two reasons for its holding:

[First,] each share of paid up stock of Class C [was] still entitled to the same dividend and [had] the same voting power and weight as each paid up share of Class A and Class B stock, although the holders of stock in Class A and B may [now have] control[led] a larger corporate vote[; and second,] [t]he holders of Class C common

148. *Shanken v. Lee Wolfman, Inc.*, 370 S.W.2d 197, 199 (1963).

149. *Id.* at 200.

150. *Id.* at 200-01.

151. *Id.* at 201.

152. *Id.* at 200.

153. *Id.* (italics in original).

stock still enjoy[ed] the peculiar and special right provided in the charter to [director] elections.¹⁵⁴

Therefore, the court concluded that “[t]he quality and relative rights of the shares in each class, as distinguished from the relative position of the classes in the capital structure, [had] remained identical.”¹⁵⁵ However, such a holding actually vitiates shareholder voting group rights because it fails to recognize the overarching restrictions of the statutory language rather than the two very narrow instances addressed by the court. Hence, jurisdictions patterning their corporate laws after either Delaware or the Model Act that also incorporate the “adversely affected” language into their statutes impose a more restrictive philosophy which ultimately prevents courts from finding a basis for shareholder voting group rights.

V. THE AMENDMENTS ALTERED WASHINGTON’S TRUE PHILOSOPHY FOR MINORITY SHAREHOLDER VOTING RIGHTS

The recent technical and substantive changes, Washington’s historical corporate law, and judicial interpretation of various corporate law indicate that the legislature’s recent amendments to Washington’s Business Corporation Act have altered Washington’s traditionally liberal corporate law philosophy into a contrary permissive philosophy for corporations and into an even more restrictive philosophy for voting groups.¹⁵⁶ Although some of the technical changes were relatively minor and add to consistency and clarification,¹⁵⁷ the substantive changes to the statutory language imply a more restrictive philosophy. First, the inclusion of the phrase “adversely affect” more restrictively qualifies the situations in which voting group rights arise.¹⁵⁸ Second, since the deletion of the word “decrease” from subsection one centers on the fact that a decrease in the aggregate number of shares will not *adversely affect* the shareholders,¹⁵⁹

154. *Id.* at 201.

155. *Id.*

156. See discussion *supra* Parts II–IV. Washington practitioners have already recognized this attempt to conform more closely to Delaware’s more restrictive philosophy. See generally Landefeld et al., *supra* note 62, at § 9.11.

157. See ORRICK WASH. CORP. LAW UPDATE, WASHINGTON AMENDS THE BUSINESS CORPORATION ACT, <http://www.orrick.com/fileupload/173.pdf>.

158. See discussion *supra* Part III.B.

159. Although there appears to be “little potential for harm to existing [share]holders” from a decrease in the aggregate number of shares in that class or series, see WASHINGTON SOURCEBOOK, *supra* note 44, at § 10.040-45 history & committee cmt., there are still many states that have retained this language in their statutory provisions. The following thirty-two states have retained the clause “increase or decrease the aggregate number of shares of the class” in their respective statutory provisions: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Michigan, Missouri, Nebraska, New Hampshire, North Carolina, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Utah, Ver-

this change restricts shareholders from voting entirely when any form of a decrease occurs. And third, the addition of a provision which allows corporations to opt out of the statutorily imposed voting rights further empowers the corporation to remove and restrict what once was a liberal shareholder voting right.¹⁶⁰

Perhaps more importantly, however, is that Washington's history of voting group rights indicates a legislative intent to provide more protections to minority shareholders through these voting group rights, even though the statutes were simultaneously created to enable corporations to use a somewhat broader and more discretionary power to govern.¹⁶¹ Although legislative intent may change over time and subsequent changes may be necessary to modernize Washington's corporate law,¹⁶² such modernization¹⁶³ to Washington's corporate law should not discount the fact that Washington has for nearly 150 years consistently protected and expanded the liberal protections afforded to shareholder voting groups.¹⁶⁴ Moreover, such modernization should not be promulgated at the expense of minority shareholder protections of their economic interests. These severe qualifications to voting groups rights represent a dramatic and restrictive alteration to Washington's corporate law by the legislature.

Finally, judicial interpretation from jurisdictions adopting the Model Act—which contains the same language as the Amended Washington Act—are precluding shareholders from voting as separate voting groups. In looking to the case law,¹⁶⁵ courts that have resolved disputes

mont, Virginia, Wisconsin, and Wyoming; and the following 14 States have either eliminated the entire provision or do not contain "decrease" from their statutory counterparts: Florida, Iowa, Louisiana, Massachusetts, Minnesota, Mississippi, Nevada, New Jersey, New Mexico, New York, North Dakota, Ohio, Pennsylvania, and Washington. *Id.* Interestingly, even Delaware, with its restrictive "adversely affect" clause, has opted to leave in the term "decrease." *See supra* note 96. This suggests that there continues to be an implicit underlying philosophy to grant broad and liberal shareholder powers, even though courts are not interpreting the statutes in this manner.

160. *See* discussion *supra* Part III.B.

161. *See* discussion *supra* Part II. *See also supra* notes 30, 31, 35, 41, 47.

162. *See* discussion *supra* Part II.B. *See also supra* notes 29, 30, 34, 41, 47.

163. In terms of the process to modernize Washington's corporate law, a plausible argument can be made that the changes to Washington's Business Corporation Act produce cost savings to the corporations. *See* Coonrod, *supra* note 69. These potential cost savings come in the form of transactional or administrative cost savings because the corporation will have fewer votes to consider and a group vote will not amount to unwanted extortion costs. Interview with Professor Eric Chiappinelli, Associate Dean, Seattle University School of Law, in Seattle, Wa. (Mar. 2, 2006).

164. *See* discussion *supra* Part II.

165. In researching this issue, the author discovered that the vast majority of litigated problems dealt with differences between shareholders and directors in the terms and conditions to mergers. Washington, like most states, has separate provisions pertaining to mergers and acquisitions. *See* WASH. REV. CODE § 23B.11.035 (2003). Washington's sister statute for mergers, which was enacted at the same time as the voting groups statute, is almost identical in the types of situations in which shareholders are entitled to vote as a separate voting group. *See id.* However, a discussion of this particular provision is outside the scope of this Comment.

over amendments to the articles of incorporation have been very reluctant to find shareholders to be “adversely affected” by the amendment¹⁶⁶ and are consequently much more restrictive in permitting voting group rights. Thus, Washington can anticipate court interpretations with similarly restrictive results to shareholders when disputes over amendments arise.¹⁶⁷ Such interpretation would be inconsistent with Washington’s traditionally liberal protections of shareholder voting rights.

VI. A PROPOSITION FOR WASHINGTON’S BUSINESS CORPORATION ACT

Because the Amended Washington Act now recognizes a more restrictive underlying philosophy for shareholder voting groups that is contrary to Washington’s historically liberal philosophy, the legislature should revise Washington’s voting group provision. First, the qualifying phrase “adversely affected” should be deleted and replaced with the former term “burdensome.” This would embody Washington’s more liberal philosophy and the previously underlying legislative intent to protect minority shareholders’ voting rights.

Second, the term “decrease” should be reinserted to provide voting group rights when a decrease in the aggregate number of shares occurs, once again allowing the shareholders to exercise more liberal voting rights, even when proposed amendments may be advantageous to the shareholders’ position.

And finally, in light of the more recent catastrophes involving corporate flexibility,¹⁶⁸ the newly added aspects of the provision that provide for added corporate flexibility should be deleted. By eliminating the provisions that provide for more corporate flexibility, Washington’s

166. Out of the cases litigated so far that have dealt with amendments to the articles of incorporation that ultimately involve voting groups, only two issues have been presented: first, whether the rights or preferences have been changed or reduced; and second, whether an increase or decrease in the aggregate number of shares affected the shareholders of that particular class. *See* discussion *supra* Part IV. This equates to only two of the nine enumerated instances found in the Amended Washington Act. *See supra* note 13. Thus, courts had not come close to exhausting the possibilities for interpreting shareholder voting group rights under the more liberal philosophy.

167. An argument can be made that Washington courts will have very few instances in which to intervene because most corporations will either recognize that an amendment will adversely affect the minority shareholders, and thus permit them to vote as a separate voting group, or else the corporate attorneys will err on the side of caution and counsel the corporations to permit the affected class to vote as a separate voting group. However, the author is of the opinion that this argument begs the question of why the corporations or corporate attorneys would be unable to make that determination under the more liberal “burdensome” standard. To the contrary, the fact that this is not an area heavily litigated suggests that 1) corporations were already aware under the previous philosophy when proposed amendments were “burdensome” to shareholders, or 2) attorneys were already doing a fantastic job under the previous philosophy of advising corporations of the situations whereby shareholders would be permitted to vote as separate voting groups.

168. *See* discussion *supra* Part I. *See* discussion *supra* note 2.

corporate law would be providing minority shareholders once again with the tool by which they can protect their economic interests in the corporation: the voting group.

With these changes in place, minority shareholders would have increased capacity to block proposed amendments to the articles of incorporation that would be detrimental to their investment in the corporation. Without this vote, majority shareholders, who may have little economic interest in the company, would be able to commandeer the minority shareholders' economic investment in a potentially catastrophic way. The current status of Washington's corporate law now allows for such an outcome. And although providing for more corporate flexibility might initially have some appeal, ultimately very few, if any, investors are going to want to invest in a company in which they cannot protect their economic investments as a minority shareholder. Thus, a return to Washington's previous philosophy of more liberal shareholder voting rights is merited.

VII. CONCLUSION

Beginning in 1866 and continuing through today, Washington's corporate law has undergone a transformation consisting of various stages. One such stage involved the recent amendment to RCW 23B.10.040, which pertains to a particular aspect of shareholder voting that permits voting groups to vote separately on proposed amendments to the articles of incorporation. Such amendments at this stage have consequently altered Washington's previously liberal shareholder voting group philosophy.

The history of Washington's corporate law, and in particular the history pertaining to its voting groups, shows an underlying intent to protect minority shareholders interests through means of voting group rights. In light of this history, the recent amendments have ultimately altered Washington's corporate governance philosophy. Although the statutory language has been changed for clarification purposes, additions and alterations in the substantive language have created a more restrictive philosophy. The case law from Delaware, as well as from other jurisdictions interpreting statutory language similar to Washington's, indicates a much more narrow interpretation that severely restricts shareholder voting group rights.

However, Washington can return to its liberal philosophy with a few strokes of the pen by deleting the qualifying phrase "adversely affected," and by reinserting the term "decrease" to allow voting groups to vote even where the amendment is advantageous to them. Additionally, eliminating the bases of added corporate flexibility will realign

Washington's Business Corporation Act with its historically more liberal philosophy. Accordingly, minority shareholders of Washington corporations will once again enjoy the more liberal protections once afforded them under Washington's true shareholder voting group philosophy.